IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL (ST) NO.1608 OF 2005

Madanlal Gajadhar Prasad
Kesarwani & Anr. .... Appellants

Vs.

Municipal Corporation of
Greater Mumbai. .... Respondents

Mr. P.K. Dhakephalkar with Ms. Geeta Shastri and Mr. Amit Shastri for the appellants.

Mr. A.Y. Sakhare, senior counsel with Mr. J. Xavier for the B.M.C.

CORAM: SMT. RANJANA DESAI, J.

DATED: 18TH MARCH, 2005.

P.C.:-

1. This first appeal is directed against the judgment and decree dated 24/12/2004 passed by the City Civil Court at Bombay in L.C. Suit No.5698 of 1993. The suit was filed by one Smt. Sonabai G. Prasad against the Municipal Corporation of Greater Mumbai for a decree of permanent injunction restraining the Municipal Corporation for Greater Mumbai from demolishing the plaintiff's stall without following the due process of law.

2. It appears that the plaintiff expired in January, 2004. It appears that ad-interim injunction was granted in the present suit. Therefore, an application came to be preferred by the Corporation, which referred to the Supreme Court judgment in **Maharashtra Ekta Hawkers Union & Anr. v. Municipal Corporation, Greater Mumbai & Ors., 2004 (1) SCC 625**. It was stated that the said judgment

laid down the modalities pursuant to which the scheme for hawking is required to be implemented and for which the Corporation is directed to bring the said judgment to the notice of all courts in which matters relating to hawkers are pending. It is further stated that in view of the judgments of the Supreme Court dated 9/12/2003 and 28/7/2004, the injunction granted by the City Civil Court be vacated and the suit be dismissed. After this application was made, the trial court heard the matter and, in its judgment, it recorded that "Mr. Diwadkar, the learned counsel for the plaintiff fairly states that he has no objection if the suit is dismissed pursuant to the judgment of the Hon'ble Apex Court and directions may be given to refer the matter to the Committee". After recording the statement of Mr. Diwadkar and, after referring to the said judgment of the Supreme Court, the trial court dismissed the suit. That judgment is under challenge before me.

3. I have heard Mr. Dhakephalkar, the learned counsel appearing for the appellants and Mr. Sakhare, the learned counsel appearing for the respondents.

4. Mr. Dhakephalkar, the learned counsel for the appellants contended that the plaintiff expired in January, 2004. On 24/12/2004, therefore, Mr. Diwadkar could not have been instructed by the plaintiff to make such a statement on facts. He submitted that the concession was wrongly made and, in fact, it is not in

accordance with law. Drawing my attention to the averments in the plaint, Mr. Dhakephalkar contended that the plaintiff has nowhere stated that the plaintiff is a hawker and, therefore, there is no question of making such a concession. He submitted that inasmuch as a wrong concession is made when the plaintiff was not alive, interest of justice demands that this judgment and decree be set aside and the matter be remanded to the trial court for rehearing. He submitted that a wrong concession made by the advocate will not bind the party.

5. As against this, Mr. Sakhare, the learned counsel appearing for the Corporation, contended that if the plaintiff had expired in January, 2004, the suit itself had abated on that day. Relying on the judgment of the Supreme Court in **State of Maharashtra v. Ramdas Shrinivas Nayak, AIR 1982 SC 1249**, Mr. Sakhare contended that if, according to the appellants, the trial court had wrongly recorded the concession, then the correct remedy for the appellants, is to approach the same judge and get the error rectified. He contended that the appellants cannot approach this court for correction of the said error as the attention of the trial court will have to be drawn to it and it will have to be urged before the trial court that the concession was wrongly made.

6. The observations of the Supreme Court in **Ramdas Shrinivas's case (supra)** are material. The relevant portion of the said judgment reads thus:

"The Court is bound to accept the statement of the judges recorded in their judgment, as to what transpired in court. It cannot allow the statement of the Judges to be contradicted by statement at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges, who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error."

7. In this case, admittedly when the concession was

made, the plaintiff was not alive. Therefore, it appears to me that the plaintiff could not have instructed the counsel to make any concession in the court. In the peculiar facts and circumstances of the case, it will have to be seen whether the concession was wrongly made or wrongly recorded. In the light of the judgment of the Supreme Court in **Ramdas Shrinivas's case (supra)**, it is only the trial court which can examine this aspect. Since, the plaintiff is dead, the heirs of the plaintiff may have to be brought on the record of the suit. In the circumstances of the case, therefore, in my opinion, the following order should meet the ends of justice.

8. The impugned judgment and decree of the trial court is set aside. If any application is made in L.C. Suit No.5698 of 1993 for setting aside abatement and for bringing heirs of the deceased plaintiff on record, the trial court shall entertain that application and decide it on its own merits. If the abatement is set aside, the trial court is directed to consider whether the concession was wrongly made and, whether the plaintiff is a hawker or not, after giving opportunity to both sides to make their submissions and adduce evidence, if necessary. All contentions of both sides are kept open. It is clarified that on merits of the case of the parties, this court has not expressed any opinion and the trial court will consider all contentions of both parties independently. I am informed that the Corporation has not filed its written statement in the trial court. If

the abatement is set aside, the Corporation shall file its written statement within a period of eight weeks from the day on which abatement is set aside. If the abatement is set aside and if the trial court comes to a conclusion that the plaintiff is not a hawker then the trial court shall dispose of the suit within a period of six months from the day it sets aside the abatement. Needless to say that till such time, the suit is heard and disposed of, the Corporation shall not take any coercive steps against the appellants without following due process of law.

9. The first appeal is disposed of in the aforestated terms.

10. In view of the above, the connected civil application is also disposed of.

(SMT. RANJANA DESAI, J.)